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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 226

GABBS EXPLORATION COMPANY, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A8) is reported in 315 F. 2d 37. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1963. A petition for rehearing was denied on March 26, 1963. The petition for a writ of certiorari was filed on June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority to declare mining claims null and void on the ground of abandonment.

STATUTES INVOLVED

Section 441, Revised Statutes, as amended, 5 U.S.C. 485, provides in pertinent part:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * * *
>
> 13. Public lands, including mines.

Section 453, Revised Statutes, 43 U.S.C. 2, provides:

> The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

STATEMENT

On July 24, 1918, eight oil shale placer mining claims, known as the Mullins claims, were located on lands of the United States in Rio Blanco County, Colorado. In December 1917, and February 1918, 18 similar mining locations, known as the Sibbald-Coral claims, were made on public lands in Garfield County, Colorado. Since adoption of the Mineral Leasing Act of 1920, 41 Stat. 437, oil shale lands have no longer been open to location but pursuant to Section 37 of that Act, 41 Stat. 451, 30 U.S.C. 193, "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated * * * may be perfected under such laws, including discovery."

On March 30, 1929, respondent's predecessor in office, acting in accordance with a procedure established by his regulations, caused a contest to be initiated against locators of the Mullins claims based on charges that yearly assessment work of a reasonable value of $100.00 had not been performed and that the claims had been abandoned. Notice was served on the claimants in a form which stressed that pursuant to departmental rules of practice failure to answer would be taken as an admission of the truth of the charges (Jt. App. 10–11). No answer nor other form of response was made. On June 5, 1929, the Commissioner of the General Land Office, acting for the Secretary, declared the Mullins claims null and void. Notice of this action was also given to the locators who, again, made no response (Jt. App. 11–12).

On December 31, 1929, the then Secretary of the Interior also caused a contest to be instituted against the locators of the Sibbald-Coral claims based on the same charges, i.e., failure to do assessment work and abandonment. Service was made on the locators but no answer or response was made. By Commissioner's letter dated May 19, 1930, these claims were declared null and void. The Sibbald-Coral locators were informed of this action but made no response (Jt. App. 20–22).

Some of the lands included in the Mullins claims were patented in February 1921, and February 1923, and 640 acres of the area covered by the Sibbald-Coral claims were patented in 1940. These patents reserved the mineral rights. A 1930 executive order withdrawing all oil shale lands from the public do-

main was later modified to permit oil and gas leasing and, since 1954, oil and gas leases have been issued by the United States on substantial portions of the land (Jt. App. 13, 19, 33, 43).

In 1956, petitioner obtained quit-claim deeds from the original locators or their assignees and applied for patents pursuant to the provisions of 30 U.S.C. 21 (Jt. App. 11, 20–21, 40–42). The Manager of the Land Office at Denver, on February 14, 1958 (Sibi ld-Coral), and August 25, 1958 (Mullins), rejected the applications on the obvious ground that the claims had been declared null and void. In separate appeals, the Director of the Bureau of Land Management affirmed by decisions dated April 20, 1959, and June 29, 1959, and the Secretary of the Interior affirmed by decisions dated April 25, 1960 (Jt. App. 17–38), and May 24, 1960 (Jt. App. 15–17). This suit was then instituted resulting in the entry of summary judgment in favor of the respondent on December 1, 1961 (Jt. App. 55). The Court of Appeals for the District of Columbia Circuit affirmed on February 14, 1963 (Pet. App. A1–A8).

ARGUMENT

The decision below is correct and not in conflict with decisions of this Court or any other court. Accordingly, there is no need for further review.

1. Faced with the authority of *Cameron* v. *United States*, 252 U.S. 450, and *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, petitioner concedes that the Secretary of the Interior has the "undoubted power" to determine the validity of mining claims with respect to such matters as sufficiency of discovery, the mineral-

ity of the land and all similar issues going to deciding whether the locator "has obtained property from the United States" (Pet. 14). Nor is it denied that a mining claim can be lost by abandonment—as this Court has often held. *Black* v. *Elkhorn Mining Co.*, 163 U.S. 445, 450; *Farrell* v. *Lockhart*, 210 U.S. 142, 147. Petitioner's sole point is that the Secretary is without authority to determine charges against mining claims based on events "subsequent to the original location and perfecting of the claim" (Pet. 14). No case so limiting the authority of the Secretary is cited, and a precise statement in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 645, affirming the Secretary's authority to cancel mining claims by reason of abandonment, is, without more, dismissed as dictum.[1]

2. The authority of the Secretary of the Interior to determine all issues relating to asserted rights against the United States in the public domain "so long as the legal title * * * remained in the United States" has consistently been pronounced by this Court. *United States* v. *Schurz*, 102 U.S. 378, 396 (1880); *Orchard* v. *Alexander*, 157 U.S. 372, 383 (1895);

[1] A preliminary defect in petitioner's argument is the assumption that a charge of abandonment necessarily assumes a "perfected" claim. This is not correct. Just as a court that disposes of a case on the basis of a statute of limitations or on proof that a mining claim has been abandoned is not required to make a finding with respect to the initial validity of the barred interest no more does the Secretary rule on the validity of mining claims if he finds they have been abandoned. He does not have to reach that issue. The point is that, valid or invalid, the claim no longer exists and possession reverts to the United States.

Knight v. *U.S. Land Association*, 142 U.S. 161, 177 (1891); *Cameron* v. *United States*, 252 U.S. 450, 459–460 (1920); *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 338 (1963); *Boesche* v. *Udall*, No. 332, October Term, 1962. This long-recognized authority is not limited to determining whether an "equitable interest" has been earned in the first instance by a homestead applicant or a mining claimant but includes authority to consider and determine whether subsequent conduct of the applicant or claimant has resulted in loss of such an interest. As this Court said in *Best* v. *Humboldt Mining Co.*, *supra* (p. 338), "If a patent has not issued, controversies over the claims 'should be solved by appeal to the land department and not to the courts.' *Brown* v. *Hitchcock*, 173 U.S. 473, 477." Petitioner urged below that the Department of the Interior retains jurisdiction over the land in question (Pet. App. A6). He does not deny that such issues as "if the lands are still mineral" (*Best* at p. 336) and "so long as he complies with the provisions of the mining laws" (*Boesche*, fn. 7), which the Secretary may decide, relate to events "subsequent to the original location and perfecting of the claim" (Pet. 14). Hearings on such issues, subsequent to original location on the public domain, are treated as appropriate for executive administration in the first instance.

Thus, in *Orchard* v. *Alexander*, 157 U.S. 372, cited with approval in *Cameron* v. *United States*, 252 U.S. 450, 460–461, the Secretary's authority was upheld with respect to a preemption claim that had been accepted and payment completed—a situation that also involved

an interest that was property "in the fullest sense of the term." In that case, this Court held that the Secretary could decide whether there had been fraud in the making of final proofs, saying (p. 383):

> The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.

See also *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 593. And even in *Wilbur* v. *Krushnic*, 280 U.S. 306, where it was held that the Secretary had erred in declaring a claim forfeited for failure to do assessment work, this Court did not question the Secretary's *jurisdiction* to make such a determination. Finally, as noted by the court of appeals (Pet. App. A4), the scope of the Secretary's authority on this precise point was unequivocally declared by Mr. Justice Hughes in *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U.S. 639, 645, as follows:

> There was authority in the Secretary of the Interior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, *or that it was subject to cancellation by reason of abandonment.* [Emphasis added.]

Petitioner seeks to dismiss the foregoing as dictum but fails to show that it is not in complete harmony with the reasoning of the foregoing authorities. It has long been followed by the courts. See, e.g., *Rob-*

bins v. *Elk Basin Consol. Petroleum Co.*, 285 Fed. 179, 181 (D. Wyo., 1922), holding conclusive in subsequent litigation a departmental declaration that a mining claim had been abandoned.

3. The "executive and legislative expressions" relied upon as proof of the unsoundness of the "*Development Corp.* dictum" (Pet. 16–18) do not support petitioner's argument. The 1931 opinion of Solicitor Finney, 53 I.D. 491, concluded only that there was "room * * * for considerable doubt" as to the conclusiveness of a departmental finding of abandonment. An expression of doubt is not authority for the negative. The Act of August 13, 1954, 68 Stat. 708, 711, 30 U.S.C. 527, merely provides a method whereby lessees or holders of a related interest under the mineral leasing laws can institute a procedure for the purpose of having conflicting mining claims limited to minerals not governed by the leasing laws. The latter legislation, at best, merely supplements the Secretary's independent authority to institute adverse proceedings and to find that mining claims have been lost by failure to comply with the mining laws or by abandonment.[2] Indeed, abandonment would seem to

[2] As the modification of the decree directed by this Court in *Wilbur* v. *Krushnic*, 280 U.S. 306, 319, demonstrates, it is not correct to state (Pet. 11–12) that "the passage of an equitable title and entitlement to a patent are adjudicated once the purchase price is paid and a receipt issued." See also *Cameron* v. *United States*, 252 U.S. 450, 460–461; *Union Oil Co.* v. *Udall*, 289 F. 2d 790 (C.A.D.C. 1961); *Adams* v. *United States*, No. 17,902 (C.A. 9, June 10, 1963). The fact that the Colorado Land Office issued petitioner a routine receipt for the $7,200 it paid in connection with its patent application (Pet. 11) did not overturn the prior adjudication of abandonment, later

be by definition failure to comply with the mining laws.

4. Lastly, there are no "inconsistencies" or "conflicting expressions" in this Court's recent *Boesche* and *Best* cases (Pet. 9). In both decisions, this Court upheld the broad authority of the Secretary over public land matters, particularly in matters appropriate for continuing administrative supervision. The issue of the abandonment of mining locations, throughout the public domain, is important to the administration of those lands and an appropriate subject of executive supervision. Since *Best* v. *Humboldt Mining Co.* did not involve "adverse mining claims" or an application for a patent, we do not understand petitioner's reference to the provisions of 30 U.S.C. 30 in its criticism of that decision (Pet. 9, 14).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

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brought to light in processing the application. *El Paso Brick Co.* v. *McKnight*, 233 U.S. 250, 257 (Pet. 11-12) merely holds that rights of a claimant may not be declared void upon review by the Secretary for a wrong legal reason.

U.S. GOVERNMENT PRINTING OFFICE: 1963